

ORIGINAL

1 Paul Alexander (Bar No. 49997)  
 2 AlexanderP@howrey.com  
 3 HOWREY LLP  
 4 1950 University Avenue  
 5 East Palo Alto, CA 94303  
 6 650.798.3500  
 7 650.798.3600 (fax)

8 Robert G. Abrams  
 9 AbramsR@howrey.com  
 10 Thomas A. Isaacson  
 11 IsaacsonT@howrey.com  
 12 Peter A. Barile III  
 13 BarileP@howrey.com  
 14 HOWREY LLP  
 15 1299 Pennsylvania Avenue, N.W.  
 16 Washington, DC 20004  
 17 202.783.0800  
 18 202.383.6610 (fax)

19 Emily L. Maxwell (Bar No. 185646)  
 20 MaxwellE@howrey.com  
 21 HOWREY LLP  
 22 525 Market Street, Suite 3600  
 23 San Francisco, CA 94105  
 24 415.848.4947  
 25 415.848.4900 (fax)

26 *Attorneys for Plaintiffs, on behalf of themselves and others similarly situated*

27 UNITED STATES DISTRICT COURT  
 28 NORTHERN DISTRICT OF CALIFORNIA

29 ANDREA RESNICK, GARY BUNKER, JOHN )  
 30 HALEY, AMY LATHAM, ERIC ROSLANSKY, )  
 31 and KEVIN SIMPSON, on behalf of themselves )  
 32 and others similarly situated, )  
 33 *Plaintiffs,* )  
 34 v. )

35 WALMART.COM USA LLC, WAL-MART )  
 36 STORES, INC and NETFLIX, INC., )  
 37 *Defendants.* )  
 38

E-filing

Case No. **CV 09 0002**

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

MEJ


**FILED**

JAN - 2 2009

RICHARD W. WIEKING  
 CLERK, U.S. DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA

FAXED

HOWREY LLP

CLASS ACTION COMPLAINT  
 Case No.

1 NOW COME Plaintiffs, ANDREA RESNICK, GARY BUNKER, JOHN HALEY, AMY LATHAM, ERIC  
2 ROSLANSKY, and KEVIN SIMPSON, for their Complaint brought under Sections 1 and 2 of the Sherman  
3 Antitrust Act of 1890, 15 U.S.C. §§1-2, and Sections 4 and 16 of the Clayton Antitrust Act of 1914, 15  
4 U.S.C. §§15 & 29, for treble damages and injunctive relief against Defendants Netflix, Inc. ("Netflix"),  
5 Wal-Mart Stores, Inc. ("Wal-Mart Stores"), and Walmart.com USA LLC ("Walmart.com").

6 Based upon personal knowledge, information, and belief, and the investigation of counsel,  
7 Plaintiffs allege as follows:

8 **NATURE OF THE ACTION**

9 1. On or about May 19, 2005, Netflix, Wal-Mart Stores, and Walmart.com, a wholly owned  
10 subsidiary of Wal-Mart Stores, entered into an agreement to divide the markets for the sales and online  
11 rentals of DVDs in the United States ("Market Division Agreement"), with the purpose and effect of  
12 monopolizing and unreasonably restraining trade in at least the online DVD rental market.

13 2. The meetings that led to the conspiracy began in January 2005, when Reed Hastings, the  
14 CEO of Netflix, and John Fleming, then the CEO of Walmart.com, met with each other for dinner to  
15 discuss the online DVD rental and DVD sales markets and how they could reach an agreement that  
16 would reduce or eliminate competition in those markets. According to Hastings, having "noticed how  
17 low Wal-Mart's prices [for DVDs] were," he "called the CEO [of Walmart.com] in January and asked  
18 if he could have dinner." Fleming, who reported directly to Wal-Mart Stores' CEO Lee Scott,  
19 accepted Hastings' invitation; the two thereafter met and, as a result of the meetings and exchanges  
20 that followed, Defendants entered into the contract, combination, and conspiracy alleged herein. At  
21 the time of their initial meeting and prior to entering into the Market Division Agreement, Netflix and  
22 Walmart.com were direct competitors in renting DVDs online and all three defendants were potential  
23 competitors in selling new DVDs to consumers. However, by no later than May 19, 2005, Netflix,  
24 Wal-Mart Stores, and Walmart.com entered into an agreement by which Walmart.com would stop  
25 competing with Netflix in the online DVD rental business and Netflix would promote the sales of new  
26 DVDs by Wal-Mart Stores and Walmart.com, and not sell new DVDs in competition with them.

27 3. Wal-Mart Stores actively participated in this conspiracy. This is confirmed by, among  
28

1 other things, the fact that prior to the announcement of the Market Division Agreement, John Fleming  
2 was promoted to Chief Marketing Officer of Wal-Mart Stores. As of the time of the announcement of  
3 the Market Division Agreement, Fleming thus was acting in his capacity both as the Chief Marketing  
4 Officer of Wal-Mart Stores and the Wal-Mart Stores executive responsible for overseeing the  
5 operations of Walmart.com. As Chief Marketing Officer of Wal-Mart Stores, Fleming was responsible  
6 for deciding "what the largest, most powerful retailer in history will stock on its shelves, and how  
7 much those products will cost. Such decisions, when made at Wal-Mart, can help make or break entire  
8 industries."

9 4. Defendants' conspiracy enabled Netflix to charge its customers higher subscription prices  
10 for the rental of DVDs than it otherwise would have. As a result of their contract, combination, and  
11 conspiracy as well as Netflix's unlawfully acquired and maintained market and monopoly power,  
12 Netflix actually did overcharge Plaintiffs, and millions of other consumers similarly situated, and  
13 continues to do so.

14 5. Under the Market Division Agreement, Netflix, Wal-Mart Stores, and Walmart.com agreed  
15 that they would restrain trade and eliminate competition. Wal-Mart Stores and Walmart.com agreed  
16 that Walmart.com would stop competing with Netflix in the online rental market. Netflix agreed that it  
17 would not sell new DVDs, but instead would promote the DVD sales of Wal-Mart Stores and  
18 Walmart.com. In agreeing to promote the sale of DVDs by Wal-Mart Stores and Walmart.com,  
19 Netflix provided consideration for the agreement by Wal-Mart Stores and Walmart.com that  
20 Walmart.com would exit the online DVD rental market and simultaneously confirmed to Wal-Mart  
21 Stores and Walmart.com that Netflix would not enter the market to sell new DVDs, as Netflix was  
22 well-positioned and otherwise had the unilateral economic incentive to do. Since entering into the  
23 Market Division Agreement, neither Wal-Mart Stores nor Walmart.com have rented DVDs online and  
24 Netflix has not sold new DVDs. The Market Division Agreement served to entrench and enhance  
25 Defendants' dominant market positions and otherwise cause harm to competition, including enabling  
26 Netflix to charge higher subscription prices for online DVD rentals than it would have had they not  
27 entered into the agreement. Plaintiffs and all other similarly situated consumers in fact paid the higher  
28

1 subscription prices to Netflix.

2 6. As alleged below, this case is brought as a class action on behalf of all consumers in the  
3 United States who, during the period May 19, 2005, to the present (hereinafter, the "Class Period"),  
4 paid a subscription fee to rent DVDs from Netflix. Plaintiffs bring this action under Sections 4 and 16  
5 of the Clayton Antitrust Act to seek redress in the form of treble damages and other relief for their  
6 injuries resulting from Defendants' violations of law on behalf of themselves and other similarly  
7 injured consumers nationwide and to seek a declaration that the Market Division Agreement is null and  
8 void.

9 **PLAINTIFFS**

10 7. ANDREA RESNICK ("Resnick") is an individual consumer who resides in San Francisco,  
11 California. During the Class Period, Resnick directly subscribed to Netflix for her personal, non-  
12 commercial use. The subscription fees Resnick paid to Netflix for renting DVDs were greater than she  
13 would have paid, but for the antitrust violations alleged herein.

14 8. GARY BUNKER ("Bunker") is an individual consumer who resides in San Angelo, Texas.  
15 During the Class Period, Bunker directly subscribed to Netflix for his personal, non-commercial use.  
16 The subscription fees Bunker paid to Netflix for renting DVDs were greater than he would have paid,  
17 but for the antitrust violations alleged herein.

18 9. JOHN HALEY ("Haley") is an individual consumer who resides in Fairfax, Virginia. During  
19 the Class Period, Haley directly subscribed to Netflix for his personal, non-commercial use. The  
20 subscription fees Haley paid to Netflix for renting DVDs were greater than he would have paid, but for  
21 the antitrust violations alleged herein.

22 10. AMY LATHAM ("Latham") is an individual consumer, who resides in Bristow, Virginia.  
23 During the Class Period, Latham directly subscribed to Netflix for her personal, non-commercial use.  
24 The subscription fees Latham paid for renting DVDs were greater than she would have paid, but for  
25 the antitrust violations alleged herein.

26 11. ERIC ROSLANSKY ("Roslansky") is an individual consumer who resides in Boulder,  
27 Colorado. During the Class Period, Roslansky directly subscribed to Netflix for his personal, non-

28

1 commercial use. The subscription fees Roslansky paid to Netflix for renting DVDs were greater than  
2 he would have paid, but for the antitrust violations alleged herein.

3 12. KEVIN SIMPSON ("Simpson") is an individual consumer who resides in Washington, DC.  
4 During the Class Period, Simpson directly subscribed to Netflix for his personal, non-commercial use.  
5 The subscription fees Simpson paid to Netflix for renting DVDs were greater than he would have paid,  
6 but for the antitrust violations alleged herein.

7 **DEFENDANTS**

8 **NETFLIX**

9 13. Defendant Netflix is a Delaware corporation headquartered at 100 Winchester Circle, Los  
10 Gatos, California, 95032. Netflix is publicly traded on the NASDAQ under the symbol NFLX. Its  
11 revenues earned from engaging in interstate commerce exceed \$1 Billion annually. Through its  
12 website, www.netflix.com, Netflix rents DVDs directly to consumers nationwide by charging monthly  
13 subscription fees, which entitle customers to rent DVDs pursuant to various subscription plans. Netflix  
14 has possessed a market share of at least 75% of the Online DVD Rental Market in the United States, as  
15 defined herein, at all times during the Class Period.

16 **WAL-MART**

17 14. **Wal-Mart Stores.** Defendant Wal-Mart Stores is the largest retailer in the United States.  
18 Wal-Mart Stores is a Delaware corporation headquartered at 702 S.W. 8th Street, Bentonville,  
19 Arkansas, 72716. Wal-Mart Stores is publicly traded on the New York Stock Exchange under the  
20 symbol WMT. Its revenues earned from engaging in interstate and foreign commerce approach \$400  
21 Billion annually. Through its retail stores and its website, www.walmart.com, Wal-Mart Stores sells  
22 DVDs directly to consumers nationwide. Wal-Mart Stores sells far more DVDs than any other retailer  
23 in the United States, accounting for about 40% of all new DVDs sold to consumers domestically. Prior  
24 to the Market Division Agreement, Wal-Mart Stores' wholly-owned subsidiary Walmart.com  
25 competed with Netflix in the Online DVD Rental Market through the "Walmart DVD Rentals" service,  
26 which was available on www.walmart.com.

1        **15. Walmart.com.** Defendant Walmart.com is a wholly-owned subsidiary of Wal-Mart Stores.  
2 Walmart.com is a Delaware company with its headquarters at 7000 Marina Boulevard, Brisbane,  
3 California, 94005. It is the online component of Wal-Mart Stores' retail empire that is the leading  
4 seller of new DVDs in the United States. Prior to the conspiracy alleged herein, Walmart.com was  
5 also a major competitor of Netflix in the Online DVD Rental Market through the "Walmart DVD  
6 Rentals" service, which was available on www.walmart.com. While its financials are not publicly  
7 reported by Wal-Mart Stores, Walmart.com is ranked as the 14th largest online retailer in the United  
8 States. Through the website, www.walmart.com, Walmart.com sells DVDs directly to consumers  
9 nationwide. Consumers who purchase DVDs via www.walmart.com may have them either mailed or  
10 otherwise delivered to them directly, or may pick them up at a Wal-Mart Stores retail location via  
11 Walmart.com's and Wal-Mart Stores' "Site to Store" program.

12        **16. Wal-Mart Stores and Walmart.com.** Walmart.com and Wal-Mart Stores are, in essence,  
13 completely integrated and operated as a single commercial enterprise and hold themselves out to the  
14 public as such, by which Walmart.com is an internet sales channel for Wal-Mart Stores, rather than  
15 being an independent business entity. Wal-Mart Stores is the registrant of the www.walmart.com  
16 domain name that is used to sell products and services by Walmart.com. Likewise, Wal-Mart Stores is  
17 the registrant of www.walmartdvdrentals.com. Wal-Mart Stores' Chief Marketing Officer John  
18 Fleming has explained the relationship between Wal-Mart Stores and Walmart.com as follows: "Wal-  
19 Mart Stores set up Walmart.com as a separate company with some outside investors, but within six  
20 months Wal-Mart Stores bought back the outside interest and Walmart.com; Walmart.com now serves  
21 as a 'marketing channel' for Wal-Mart Stores."

22        **17. Wal-Mart Stores' Active Participation in the Conspiracy.** Wal-Mart Stores was actively  
23 involved in the conspiracy alleged herein, as alleged more specifically below. For purposes of these  
24 allegations, both Wal-Mart Stores and Walmart.com are active participants in the conspiracy and each  
25 is liable for the unlawful conduct alleged herein, with each, among other things, participating in, and  
26 benefiting from, the Market Division Agreement. Moreover, Wal-Mart Stores directed, ratified,  
27 approved, supported, and otherwise aided and abetted Walmart.com's violations of law.

28

1 18. Wal-Mart Stores had a strong incentive to accomplish the Market Division Agreement. In  
2 addition to its interests as the 100% owner of Walmart.com, Wal-Mart Stores had further incentive to  
3 enter into this Agreement, since it obtains substantial revenues from sales of new DVDs, as well as  
4 store traffic resulting in the sales of other goods, which would have been threatened by Netflix's entry  
5 into new DVD sales, and which were enhanced by Netflix's promotion of Wal-Mart Stores and  
6 Walmart.com through the Market Division Agreement. In a letter submitted to this Court in  
7 connection with a prior antitrust case brought against Netflix by other plaintiffs for other alleged  
8 violations of law, an assistant general counsel of Wal-Mart Stores, referring specifically to Wal-Mart  
9 Stores, wrote of "Wal-Mart's decision to discontinue renting DVDs." Moreover, it was Wal-Mart  
10 Stores that announced in part the Market Division Agreement, which identifies Wal-Mart Stores, in the  
11 "About" section of the press release. The announcement quoted John Fleming, who was then Chief  
12 Marketing Officer of Wal-Mart Stores, regarding the Agreement. It explained that Walmart.com's  
13 DVD sales are in fact Wal-Mart Stores' "online movie sales business," and that, more generally, Wal-  
14 Mart Stores' "[o]nline merchandise sales are available at www.walmart.com."

15 19. Whenever reference is made in this Complaint to a statement or transaction of any  
16 corporation or entity, the allegation means that the corporation or entity acted by or through its  
17 directors, members, partners, officers, employees, affiliates, or agents, while engaged in the  
18 management, direction, control, or conduct of the corporation's or entity's business and acting within  
19 its scope of authority.

#### 20 JURISDICTION AND VENUE

21 20. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§1331 & 1337 and 15  
22 U.S.C. §§1-2, 15 & 26.

23 21. Venue is proper in this District pursuant to 28 U.S.C. §§15, 22 & 26 and pursuant to 28  
24 U.S.C. §1391(b), (c) & (d), because at all times relevant to the Complaint: (a) Defendants transacted  
25 business, were found, or acted through subsidiaries or agents present in this District; (b) a substantial  
26 part of Plaintiffs' claims occurred in this District; and (c) a substantial portion of the affected interstate  
27 trade and commerce described below has been carried out in this District.

1 22. This Court has personal jurisdiction over Defendants because, *inter alia*, each of the  
2 Defendants is headquartered in this State or has transacted business; maintained continuous and  
3 systemic contacts; purposefully availed itself of the benefits of doing business; and committed acts in  
4 furtherance of the alleged conspiracy in this State.

5 **INTRADISTRICT ASSIGNMENT**

6 23. Pursuant to Civil L.R. 3-2, this case should be assigned to the San Francisco Division  
7 because a substantial part of the events giving rise to the claims occurred within this division. Plaintiff  
8 Andrea Resnick resides in San Francisco County and Defendant Walmart.com is headquartered in San  
9 Mateo County.

10 **INTERSTATE TRADE AND COMMERCE**

11 24. Defendants' conduct has taken place within the flow of, and substantially affected the  
12 interstate commerce of, the United States. By way of example, Defendants have sold and/or rented  
13 DVDs throughout the United States, involving hundreds of millions or billions of dollars in interstate  
14 commerce, and used the instrumentalities of interstate commerce, including interstate wires and the  
15 U.S. mail, to sell and/or to rent DVDs throughout the United States.

16 **RELEVANT MARKET**

17 25. Defendants' market allocation conspiracy is *per se* illegal and requires no allegation of  
18 market definition.

19 26. For those claims that may require market definition, the Relevant Market for purposes of  
20 these allegations during the Class Period at least is: the Online DVD Rental Market in the United  
21 States.

22 27. "DVD," as defined herein, refers to a Digital Video Disc or Blu-ray Disc containing  
23 commercially recorded entertainment programs for personal viewing. DVDs are the primary medium  
24 by which movies and other recorded entertainment are distributed in the United States. Revenues on  
25 DVDs far exceed those generated from box office receipts. In addition, DVDs have become a  
26 particularly lucrative means for the distribution of previously aired television programs, surpassing  
27  
28



1 even television syndication rights as a revenue stream in many instances. As defined herein, "DVD"

1 even television syndication rights as a revenue stream in many instances. As defined herein, "DVD"  
2 does not refer to blank Digital Video Discs, which are used to store or record data.

3 28. The relevant market is for the rental of DVDs online by subscription for delivery by mail  
4 ("Online DVD Rental Market"). At all relevant times, there have been no reasonably interchangeable  
5 substitutes for this service, which is differentiated, from both the demand and the supply side, from  
6 other methods of DVD distribution channels, as well as other methods of entertainment content  
7 delivery.

8 29. In the Online DVD Rental Market, for a monthly subscription fee, a consumer may rent  
9 DVDs from an online service provider, such as Netflix, Blockbuster Online, or (prior to May 19, 2005)  
10 Walmart DVD Rentals. There are no late fees and no due dates, but, within any given plan, the  
11 consumer pays the subscription fee regardless of how many DVDs he or she rents per month. Thus,  
12 even a consumer who does not rent a DVD for months still is charged the subscription fee; Netflix  
13 CEO Reed Hastings calls this the "gym membership effect."

14 30. To rent DVDs, consumers fill out a rental "queue" in their online profile, listing in order of  
15 preference the DVDs they wish to rent. The DVDs are then sent by the provider to the consumer's  
16 home via U.S. mail. To return the DVD and receive the next DVD in the queue, the consumer inserts  
17 the DVD in a prepaid envelope provided with the rental and mails it back; the service provider then  
18 mails the next movie on the list to the consumer. The library of titles available from online service  
19 providers has grown over time, now ranging near 100,000 DVDs—often twenty to one-hundred times  
20 the selection of titles stocked (not to mention available) at any single video rental store.

21 31. From the consumer's perspective, online DVD rentals are a differentiated service that is not  
22 reasonably interchangeable with traditional bricks-and-mortar video rental. In traditional video rental  
23 from physical stores, consumers drive to or otherwise arrive at the store, find (or do not find) what they  
24 are looking for, and pay on a per-DVD basis for their selection(s). After the designated rental period  
25 of one or more days, usually depending upon the release date of the DVD, the consumer returns his  
26 selection or potentially incurs late fees. During the Class Period as alleged herein, these late fees have

27

28

1 accounted for as much as 20% of the revenues in traditional video rental stores; there are no late fees  
2 or due dates in the Online DVD Rental Market.

3 32. There are numerous other practical indicia of the Online DVD Rental Market being a  
4 relevant product market, distinct from other forms of DVD rental, including:

5 a. **Price Competition.** No direct price competition exists between online rental and other  
6 forms of DVD rental, whether in-store, kiosk, or video downloading, which are not  
7 reasonably interchangeable with online DVD rental. For example, online DVD rentals  
8 generally are priced on a monthly subscription basis. Within any given plan, the  
9 subscription rate is independent of the number of DVDs the customer actually rents in a  
10 month. In-store DVD rentals, kiosks, and downloading generally are priced on a pay-  
11 per-view basis. Also, changes in the price of online rentals do not closely track changes  
12 in the price of in-store rentals. The pricing of online rentals is generally nationwide in  
13 scope and is not affected by local in-store prices and competition. As a result, the  
14 pricing of online rentals would generally be the same to a customer, regardless of  
15 whether the nearest rental store is two minutes or two hours away. Online rentals  
16 generally offer additional services, such as movie reviews, customer-specific  
17 recommendations based on viewing and preference history, and other metrics of  
18 popularity. The cross-elasticity of demand between these products is such that a small  
19 but significant non transitory increase in price ("SSNIP") would not cause consumers to  
20 switch from online rental to in-store rental or any other arguable method of DVD  
21 distribution and *vice versa*.

22 b. **Functional Differences.** Online rentals fundamentally differ from in-store rentals in  
23 that (1) they do not require travel to a store (including a second trip to return the DVD  
24 and potentially multiple trips if the store does not have the DVD in stock at the right  
25 time), (2) are available to anyone with a postal address, regardless of proximity to a  
26 store, (3) are primarily subscription-based services, and (4) provide a much wider  
27 selection of titles than can a brick-and-mortar store. For these reasons, among others,

28

1 Online and in-store DVD rentals are not reasonably interchangeable. Likewise, other  
2 modes of content distribution, such as kiosk, video-on-demand, and downloading,  
3 among other forms, are not reasonably interchangeable with online DVD rentals for a  
4 number of reasons, including relative selection and convenience for consumers, pricing,  
5 as well as, from the supply perspective, licensing considerations and technological  
6 limitations.

7 c. **Public and Industry Perceptions.** The online rental market is recognized as a distinct  
8 market by the public and the industry, including by Defendants.

9 d. **Admissions.** By word and deed, Defendants have confirmed and recognized the  
10 existence of a discrete online rental market. Admissions of a discrete online rental  
11 market abound from Netflix and Walmart.com and Wal-Mart Stores executives alike,  
12 including Hastings and Fleming. Very recently, a Netflix executive told the Wall Street  
13 Journal that other types of rental services, such as kiosk and in-store rentals, do not  
14 present a direct competitive threat to Netflix. That same executive acknowledged that  
15 while video downloads may be a competitive force in the future, DVD will be the  
16 dominant medium for years to come, making the entry of this technology not timely  
17 enough to be considered a competitive force in the relevant market. Netflix CEO Reed  
18 Hastings has observed that the competitive threat of internet downloading to online  
19 DVD rental during the Class Period is like that of hydrogen powered cars to gasoline  
20 powered cars—inconsequential for many years to come. He has further explained that  
21 DVDs will be the dominant medium for movies for perhaps as long as the gasoline  
22 engine.

23 33. Online DVD rentals are also a separate market from DVD sales. The pricing of DVD sales  
24 and online DVD rentals is very different. For example, the price to buy a new DVD depends heavily  
25 on how popular it is, including whether it is a new release or how successful the title originally was at  
26 the box office or on television. By contrast, online DVD renters generally charge based on a  
27 subscription fee, regardless of whether the consumer is renting popular or obscure DVDs. The  
28

1 industry and the public perceive online DVD rentals as separate from DVD sales, whether in-store or  
2 online. The factors motivating a consumer to buy a DVD are different from those that lead to renting a  
3 DVD. The former generally applies to DVDs that the consumer intends to view (either personally, or  
4 their family or friends) numerous times. The latter generally applies to DVDs that the consumer  
5 intends to view once and then return. DVDs sold at retail have other distinguishing characteristics,  
6 such as packaging and special features not available with rentals, which are delivered unadorned in  
7 envelopes. In addition, the fact of whether a DVD is new or used is not an issue in rental, but is a  
8 significant factor in sales, for used DVDs are sold at a significant discount to their new counterparts,  
9 due to them being relatively less desirable to consumers. DVD sales and online rentals also are not  
10 reasonably interchangeable for consumers intending to collect physical DVDs or to give a DVD as a  
11 gift. The cross-elasticity of demand between these products is such that a SSNIP would not cause  
12 consumers to switch from online renting to purchasing DVDs and *vice versa*.

13 34. The Geographic Market for the Online DVD Rental Market is the United States. The  
14 practical reality is that, among other things, shipping costs and transglobal differences in DVD data  
15 encoding make it neither practical nor feasible for entities located in other countries to rent DVDs to  
16 U.S. consumers.

#### 17 **MARKET AND MONOPOLY POWER**

18 35. At all relevant times, Netflix dominated the Online DVD Rental Market. Netflix has an  
19 approximate market share of 75% in the Online DVD Rental Market, and is far and away the market  
20 leader in the Online DVD Rental Market. As a result of this market share, Netflix has had and  
21 continues to have market and monopoly power in the Online DVD Rental Market; it has the power to  
22 control prices or exclude competition in this Relevant Market.

23 36. Netflix's market and monopoly power is strengthened by the significant barriers to entry in  
24 this market. There have been no significant market entrants in the more than three years since  
25 announcement of the Market Division Agreement, which increased those barriers. Online DVD rental  
26 is highly capital intensive. A firm must operate on a large scale to be successful. It requires the  
27 possession of a significant number of shipping facilities strategically located throughout the United

28

1 States to ensure timely delivery. It also requires stocking an extensive inventory of DVDs to maintain  
2 the selection of titles that consumers demand. As Netflix CEO Reed Hastings has observed, "When  
3 you think about the barriers to entry to this business, it is subtle because it appears easy. A kid can  
4 open a website. But the barriers to profitability are very large."

5 37. Since the implementation of the Market Division Agreement, the Online DVD Rental  
6 Market has been overwhelmingly comprised of only two firms: Netflix and Blockbuster, which  
7 possesses nearly all of the remaining 25% of the Online DVD Rental Market that Netflix does not  
8 control. A few minor firms have shares of less than 1-2% of the market. During fiscal years 2005-  
9 2007 combined, Netflix earned nearly \$4 Billion in revenues and \$1.3 Billion in gross profit from  
10 renting DVDs to consumers—a margin of more than 33%. As a result of Netflix's abuse of its  
11 monopoly power alleged herein, its subscription fees have been higher than they otherwise would have  
12 been.

13 38. Wal-Mart Stores and its wholly-owned subsidiary Walmart.com combined have an  
14 industry-leading 40% of domestic DVD retail sales. During fiscal years 2005-2008 combined, they  
15 earned revenues in excess of \$25 Billion by selling DVDs to consumers. Both Wal-Mart Stores and  
16 Walmart.com benefit from the Market Division Agreement.

17 39. Further evidence of Netflix's market and monopoly power is reflected in the  
18 anticompetitive effects alleged herein.

#### 19 **THE ILLEGAL AGREEMENT**

20 40. **Pre-Agreement Competition in the Online DVD Rental Market.** In early 2005, Netflix  
21 was coming off a year in which competition was growing and its stock price had dropped  
22 precipitously. It faced increasing competition from Walmart DVD Rentals and from Blockbuster  
23 Online, the latter of which had just entered the online rental market.

24 41. By mid-2004, Netflix was charging \$21.99 for its most popular subscription rental plan.  
25 Blockbuster entered the online market in earnest in August, at first charging \$19.99 but then reducing  
26 its price in November to \$17.49 for its similar plan. After that, the Walmart DVD Rentals rate was  
27 reduced from \$18.86 to \$17.36. In the wake of these price cuts, Netflix reduced its prices by nearly

1 20% (to \$17.99 per month) soon thereafter. After that, Blockbuster further decreased its price to  
2 \$14.99—20% below Netflix's already reduced price and more than 40% below the price Netflix was  
3 charging just months earlier.

4 42. Meanwhile, Wal-Mart Stores and its wholly-owned subsidiary Walmart.com, which had  
5 established themselves as the leader in new DVD sales, were facing increasing competition from in-  
6 store and online channels of distribution in new DVD sales, including competition from Amazon.com.  
7 At the time, Netflix was a significant potential additional competitor, since it had a subscriber base of  
8 millions of customers who were known in the industry to be prolific DVD buyers, and the sales and  
9 profits of Wal-Mart Stores and Walmart.com stood to suffer if Netflix began selling new DVDs to  
10 these customers. Conversely, Wal-Mart Stores and Walmart.com stood to gain significant additional  
11 sales and profits and to gain further market share in the sale of new DVDs if these customers were to  
12 make their purchases of new DVDs from them instead.

13 43. **The Walmart Price Cut.** On January 7, 2005, Walmart DVD Rentals dropped the price on  
14 its most popular DVD rental plan significantly—to \$12.97 per month—creating further price pressure  
15 on Netflix to reduce its DVD rental prices. In order to respond to the increased competition, Netflix  
16 would have been forced to lower its prices and thereby reduce its profits.

17 44. **The January Dinner Meeting.** Faced with this increasing competition, Reed Hastings, the  
18 Chairman and CEO of Netflix, called John Fleming, then the CEO of Walmart.com, and invited him to  
19 dinner to discuss the their companies' DVD sales and rentals businesses. Fleming accepted the  
20 invitation; the two met together in January 2005 and embarked upon a scheme that would result in the  
21 contract combination, and conspiracy, and agreement reflected in the Market Division Agreement.

22 45. **Hastings' Subsequent "Prediction."** On May 5, 2005, in Netflix's First Quarter earnings  
23 call with financial analysts, held after the January dinner but only two weeks prior to the public  
24 announcement of the Market Division Agreement, Hastings made plain the motive for Netflix to  
25 conspire with Wal-Mart Stores and Walmart.com:

26 In terms of profitability over the coming years, the key issue is the number of major  
27 competitors. If there are only two major players, Blockbuster and Netflix, the  
28 profitability may be substantial like other two-firm entertainment markets. If, on the  
other hand, Amazon, Wal-Mart, Blockbuster and Netflix are all major competitors in

1 online rental, then the profits would likely be small.

2 Hastings went on to "predict" on that conference call:

3 [T]he likely case is [that] online rental becomes a two-firm market over the coming  
4 years.

5 **46. The Public Announcement.** On May 19, 2005, shortly after Fleming had been promoted  
6 to Chief Marketing Officer of Wal-Mart Stores, Defendants issued a joint press release that revealed  
7 the existence of the Market Division Agreement, by which they unlawfully divided and allocated the  
8 markets for DVD sales and rentals, and did, in fact, create the two-firm market that Hastings sought.

9 **47. The Media's Reaction.** The news of the agreement was featured in a number of  
10 newspapers and other publications, in articles with aptly colorful titles, such as:

- 11 • "Wal-Mart and Netflix Scratch Each Other's Backs,"
- 12 • "Truce in DVD-Rental Wars,"
- 13 • "Wal-Mart and Netflix: An Alliance," and
- 14 • "Wal-Mart Loves Netflix: And Vice-Versa."

15 **48. The Execution.** Beginning on May 19, 2005, Walmart.com, as agreed, did in fact exit the  
16 online rental business. Walmart.com announced to all of the subscribers to "Walmart DVD Rentals"  
17 that it was exiting the online DVD rental business and that those subscribers could be transferred to  
18 Netflix. Walmart.com took additional steps to affirmatively implement the Market Division  
19 Agreement by adding a prominently placed link to the Netflix website to encourage customers to  
20 transfer their subscriptions to Netflix. Since the date of their joint announcement on May 19, 2005  
21 (apart from the 30 days that Walmart.com used to wind down its existing online rental business),  
22 neither Walmart.com nor Wal-Mart Stores has participated in the Online DVD Rental Market, and  
23 Netflix has not sold new DVDs.

24 **49.** As a result of the Market Division Agreement, downward pricing pressure from  
25 Walmart.com was eliminated and the Online DVD Rental Market was reduced to two competitors.  
26 Absent the Market Division Agreement, Netflix would have lowered its prices no later than May 19,  
27 2005. As a result of the elimination of a competitor in this Relevant Market, Blockbuster was able to



1 raise its subscription price in July to match that of Netflix, from \$14.99 per month to \$17.99 per  
2 month, in accord with Hastings' expectation that "[i]f there are only two major players, Blockbuster  
3 and Netflix, the profitability may be substantial like other two-firm entertainment markets." In  
4 Netflix's next earnings call, on August 8, 2005, Hastings boasted:

5 Last quarter we said online rental was shaping up to be a two-player market, and that is  
6 indeed what is happening.

7 50. The Market Division Agreement was not in the independent self-interest of Wal-Mart  
8 Stores, Walmart.com, or Netflix. Neither Wal-Mart Stores nor Walmart.com would have wanted  
9 Walmart.com to withdraw from the online rental market, encourage its subscribers to be transferred to  
10 Netflix, and promote Netflix's rental business absent substantial consideration from Netflix, such as an  
11 agreement not to compete for new DVD retail sales. But for the Market Division Agreement,  
12 Walmart.com would not have exited the Online DVD Rental Market when it did. Likewise, Netflix  
13 would not have foreclosed its opportunity to sell DVDs to its millions of subscribers—a base of  
14 customers who purchase on average 25 DVDs per year each—and would not have promoted new DVD  
15 sales by Wal-Mart Stores and Walmart.com, rather than its own sales, absent an agreement from them  
16 not to compete against Netflix's online rental business.

#### 17 ANTICOMPETITIVE EFFECTS

18 51. Defendants' illegal acts and practices have caused anticompetitive effects in the Online  
19 DVD Rental Market. The subscription fees charged by Netflix to Plaintiffs, as well as the other  
20 members of the Class, were maintained at artificially high and supracompetitive levels. Plaintiffs and  
21 the other members of the Class paid higher subscription prices to Netflix than they otherwise would  
22 have paid.

23 52. The Market Division Agreement (i) eliminated one of only three significant competitors in  
24 the Relevant Market, (ii) eliminated competition between Defendants, and (iii) enabled Netflix to  
25 acquire market power and also acquire and maintain monopoly power in the Relevant Market. The  
26 Market Division Agreement has enabled Netflix to implement monopolistic and supracompetitive  
27 pricing in the Relevant Market.

1 53. The Market Division Agreement and Defendants' acts and practices in furtherance thereof  
2 have no procompetitive benefits. They do not create information that consumers need, nor do they  
3 create new or better products or services. Rather, they have served to reinforce the true  
4 anticompetitive nature of the Market Division Agreement by assuring, for example, that Walmart.com  
5 not only withdrew from the Online DVD Rental Market, but further enhanced Netflix's position in that  
6 market. Even if there were any such benefits, they would not outweigh any of the anticompetitive  
7 effects described herein, and, in any event, could be achieved by less restrictive means.

8 **CLASS ACTION ALLEGATIONS**

9 54. Plaintiffs bring this action on their own behalf and as class actions under Rules  
10 23(a), 23(b)(2), and 23 (b)(3) of the Federal Rules of Civil Procedure on behalf of all members of the  
11 Class, as defined herein.

12 55. Bunker, Haley, Latham, Resnick, Roslansky, and Simpson bring this action on behalf of  
13 themselves and the members of the Class, defined as comprising:

14 Any person in the United States that paid a subscription fee to Netflix to rent DVDs, on  
15 or after May 19, 2005 up to the present. Excluded from the Class are government  
16 entities, Defendants, their co-conspirators and their representatives, parents,  
subsidiaries, and affiliates.

17 56. The Class numbers in the millions, the exact number and identities of the members being  
18 known by Defendants.

19 57. The Class is so numerous and geographically dispersed that joinder of all members is  
20 impracticable.

21 58. There are questions of law and fact common to the Class and the members  
22 thereof. These common questions relate to the existence of the conspiracy alleged, and to the type  
23 and common pattern of injuries sustained as a result thereof. The questions include, but are not  
24 limited to:

- 25 a. Whether Defendants engaged in a contract, combination, or conspiracy to  
26 allocate markets;  
27 b. Whether Defendants unreasonably restrained trade in the Online DVD Rental  
28 Market;

- c. Whether Defendants had the specific intent for Netflix to monopolize the Online DVD Rental Market;
- d. The nature and character of the acts performed by Defendants in the furtherance of the alleged contract, combination, and conspiracy;
- e. Whether the alleged contract, combination, and conspiracy violated Section 1 of the Sherman Act;
- f. Whether the alleged contract, combination, and conspiracy violated Section 2 of the Sherman Act;
- g. The anticompetitive effects of Defendants' violations of law;
- h. Whether Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole; and
- i. Whether the conduct of Defendants, as alleged in this Complaint, caused Netflix subscription fees to be higher than they otherwise would have been and thereby caused injury to the business and property of Plaintiffs and other members of the Class.

59. The questions of law and fact common to the members of the Class predominate over any questions affecting only individual members, including the legal and factual issues relating to liability and damages.

60. Bunker, Haley, Latham, Resnick, Roslansky, and Simpson are members of the Class. Their claims are typical of the claims of other members of the Class, and they will fairly and adequately protect the interests of the members of the Class. Their interests are aligned with, and not antagonistic to, those of the other members of the Class.

61. Plaintiffs are represented by competent counsel experienced in class action antitrust litigation.

62. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Class treatment will permit the adjudication of relatively small claims by members of the Class who otherwise could not afford to litigate antitrust claims such as are asserted in this Complaint. This class action presents no difficulties of management that would preclude its maintenance as a class action.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

2  
3

4  
5  
6  
7  
8  
9  
10  
11  
12

## 13

## 14

## 15

16

17  
18  
19  
20

21  
22  
23  
24  
25

26  
27

1 Division Agreement allocated the Online DVD Rental Market to Netflix, with Wal-Mart Stores and  
2 Walmart.com agreeing not to compete in that Relevant Market. The agreement also allocated new  
3 DVD sales to Wal-Mart Stores and Walmart.com, with Netflix agreeing to refrain from selling new  
4 DVDs in competition with them. In addition to explicitly or *de facto* agreeing not to sell new DVDs,  
5 Netflix also obtained the Market Division Agreement by providing potentially valuable promotion to  
6 Wal-Mart Stores and Walmart.com. In so doing, Netflix provided significant consideration to Wal-  
7 Mart Stores and Walmart.com for their agreement that Walmart.com would withdraw from, and both  
8 Walmart.com and Wal-Mart Stores would not compete in, the Online DVD Rental Market.

9 69. The Market Division Agreement has created significant anticompetitive effects and no pro-  
10 competitive benefits. It eliminated competition in the Relevant Market, raising prices paid by  
11 consumers. To the extent that there are any procompetitive benefits at all resulting from the  
12 agreement, they would not outweigh the agreement's anticompetitive effects. In any event, to the  
13 extent that there were any, they could have been achieved by less restrictive means.

14 70. As a result of this violation of law, Netflix's subscription prices charged to, and paid by,  
15 Plaintiffs and the Class are, and have been, higher than they otherwise would have been.

## 16 COUNT TWO

### 17 **SHERMAN ACT SECTION TWO (15 U.S.C. §2)** 18 **Monopolization of Online DVD Rental Market** 19 **(Against Netflix)**

20 71. Plaintiffs reallege each allegation set forth above, as if fully set forth herein.

21 72. Netflix has monopoly power in the Online DVD Rental Market.

22 73. Netflix willfully acquired and maintained its monopoly in the Online DVD Rental Market  
23 by its acts and practices described herein, including by executing, implementing, and otherwise  
24 complying with the Market Division Agreement, in violation of Section 2 of the Sherman Antitrust  
25 Act, 15 U.S.C. §2.

26 74. As a result of this violation of law, Netflix's subscription prices charged to, and paid by,  
27 Plaintiffs and the Class are, and have been, higher than they otherwise would have been.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13

**COUNT THREE**

**SHERMAN ACT SECTION TWO (15 U.S.C. §2)  
Attempt to Monopolize Online DVD Rental Market  
(Against Netflix)**

75. Plaintiffs reallege each allegation set forth above, as if fully set forth herein.

76. If Netflix does not already have monopoly power, then Netflix has a dangerous probability of success in achieving monopoly power in the Online DVD Rental Market.

77. With the specific intent to achieve a monopoly, Netflix, by its acts and practices described herein, including by executing, implementing, and otherwise complying with the Market Division Agreement, has attempted to monopolize the Online DVD Rental Market, in violation of Section 2 of the Sherman Antitrust Act, 15 U.S.C. §2.

78. As a result of this violation of law, Netflix's subscription prices charged to, and paid by, Plaintiffs and the Class are, and have been, higher than they otherwise would have been.

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**COUNT FOUR**

**SHERMAN ACT SECTION TWO (15 U.S.C. §2)  
Conspiracy to Monopolize Online DVD Rental Market  
(Against All Defendants)**

79. Plaintiffs reallege each allegation set forth above, as if fully set forth herein.

80. Defendants shared a conscious commitment to a common scheme designed to achieve the unlawful objective of the monopolization of the Online DVD Rental Market. Prior to and at the time of the agreement, Netflix and Walmart.com were actual competitors in the Online DVD Rental Market. Defendants conspired with the specific intent, knowledge and purpose that their anticompetitive agreement would result in Netflix willfully acquiring and maintaining a monopoly in the Relevant Market. Wal-Mart Stores and Walmart.com knew that the natural and probable consequence of the Market Division Agreement would be the monopolization of the Relevant Market by Netflix. Defendants have committed overt acts in furtherance of their conspiracy, including entering into, complying with, and implementing the Market Division Agreement, in violation of Section 2 of the Sherman Antitrust Act, 15 U.S.C. §2.

81. As a result of this violation of law, Netflix's subscription prices charged to, and paid by,

1 Plaintiffs and the Class are, and have been, higher than they otherwise would have been.

2 **PRAYER FOR RELIEF**

3 WHEREFORE, Plaintiffs respectfully request that:

- 4 A. The Court determine that this action may be maintained as a class action under  
5 Rule 23 of the Federal Rules of Civil Procedure, that Plaintiffs be appointed  
6 class representatives, and that Plaintiffs' counsel be appointed as counsel for the  
7 Class.
- 8 B. Defendants be adjudged to violate Sections 1 and 2 of the Sherman Antitrust Act  
9 of 1890, 15 U.S.C. §§1-2.
- 10 C. The Court declare the Market Division Agreement between Defendants  
11 announced May 19, 2005, to be unlawful and null and void.
- 12 D. Judgment be entered for Plaintiffs and the members of the Class against  
13 Defendants, jointly and severally, for three times the amount of damages  
14 sustained by Plaintiff and the Class, under Section 4 of the Clayton Antitrust Act  
15 of 1914, 15 U.S.C. §15, together with the costs of the action, including  
16 reasonable attorneys' fees, and such other relief as is appropriate.
- 17 E. Defendants, their affiliates, successors, transferees, assignees, and the officers,  
18 directors, partners, agents and employees thereof, and all other persons acting or  
19 claiming to act on their behalf, be permanently enjoined and restrained from, in  
20 any manner, continuing, maintaining or renewing the contract, combination or  
21 conspiracy alleged herein, or from engaging in any other contract, combination  
22 or conspiracy having similar purpose or effect, and from adopting or following  
23 any practice, plan, program or device having a similar purpose or effect,  
24 pursuant to Section 16 of the Clayton Antitrust Act of 1914, 15 U.S.C. §29.
- 25 F. Plaintiffs and the members of the Class have such other, further, and different  
26 relief as the case may require and the Court may deem just and proper under the  
27 circumstances.
- 28

1 **JURY DEMAND**

2 Pursuant to Rule 38(a) of the Federal Rules of Civil Procedure, Plaintiffs demand a jury trial of  
3 all issues triable by jury.

4 Dated: January 2, 2009

5 Respectfully submitted,

6  
7 By: 

8 Paul Alexander  
9 HOWREY LLP  
10 1950 University Avenue  
11 East Palo Alto, CA 94303  
12 650.798.3500  
13 650.798.3600 (fax)

14 Robert G. Abrams  
15 Thomas A. Isaacson  
16 Peter A. Barile III  
17 HOWREY LLP  
18 1299 Pennsylvania Avenue, N.W.  
19 Washington, DC 20004  
20 202.783.0800  
21 202.383.6610 (fax)

22 Emily L. Maxwell  
23 HOWREY LLP  
24 525 Market Street, Suite 3600  
25 San Francisco, CA 94105  
26 415.848.4947  
27 415.848.4999 (fax)

28 *Attorneys for Plaintiffs and others similarly situated*